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In the Supreme Court of the United States

OCTOBER TERM, 1986

ROY DAN JACKSON, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT*

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the time limitation set forth in Rule 35(b) of the Federal Rules of Criminal Procedure does not apply to a motion to reduce sentence and grant probation under 18 U.S.C. (& Supp. III) 3651.

1. On July 26, 1984, petitioner pleaded guilty to a one-count information charging him with filing a false federal income tax return, in violation of 26 U.S.C. 7206(1), and was sentenced to 30 months' imprisonment (Pet. App. A2-A3). Petitioner was ordered to begin serving his sentence on October 29, 1984. On October 19, 1984, he filed a motion for reduction of sentence pursuant to Fed. R. Crim. P. 35(b). The district court denied the motion on February 20, 1985, and directed petitioner to report for confinement on March 22, 1985 (Pet. App. A3-A4). Petitioner's motion for reconsideration of that order was denied on March 8, 1985. On March 22, 1985, the district court indefinitely extended petitioner's reporting date upon learning that petitioner had been injured in a mining accident. On October 18, 1985, the court again set a date for petitioner to begin serving his sentence (Pet. App. A4). However, on January 6, 1986, the day petitioner was

scheduled to begin his term of imprisonment, he filed a motion requesting the court to "reduce the sentence and place him on probation, or otherwise reduce the term of the sentence pursuant to Rule 35(b) of the F.R.C.P. and/or pursuant to 18 U.S.C. § 3651 *et seq.* * * *" (Pet. App. A4-A5).

The district court ruled that it did not have jurisdiction to consider petitioner's motion because it was filed more than 120 days after the imposition of sentence (Pet. App. B1-B2),¹ and the court of appeals affirmed (Pet. App. A1-A18). Execution of petitioner's sentence has been stayed pending the outcome of these proceedings (Pet. 4).

2. Petitioner contends that the time limitation of Rule 35(b) does not apply to the district court's power to grant probation under 18 U.S.C. (& Supp. III) 3651. The court of appeals correctly rejected that claim. Moreover, the present language of Rule 35(b) has been amended and 18 U.S.C. (& Supp. III) 3651 has been repealed effective November 1, 1987.² Accordingly, despite the fact that the court of appeals' decision is in conflict with the decision of another circuit, review by this Court is not warranted.

a. The Probation Act, passed in 1925, grants district courts the authority to suspend imposition or execution of a sentence and place the defendant on probation, but does not specify a time period within which that authority may be exercised. Rule 35(b), Fed. R. Crim. P., as amended in 1966, provides that a motion to reduce sentence must be

¹ The district court noted that if it had jurisdiction, it would consider suspending all but six months of the 30-month sentence and placing petitioner on supervised probation for the balance of the 30-month term (Pet. App. A5).

² 18 U.S.C. (& Supp. III) 3651 is repealed pursuant to Pub. L. No. 98-473, Tit. II, Ch. II, § 212(a)(1), and (2), 98 Stat. 1987 (Oct. 12, 1984). Rule 35(b) is amended pursuant to Pub. L. No. 98-473, Tit. II, §§ 215(b), 235, 98 Stat. 2015, 2031 (Oct. 12, 1984), as amended by Pub. L. No. 99-217, § 4, 99 Stat. 1728 (Dec. 25, 1985), and Pub. L. No. 99-570, Tit. I, § 1009, 100 Stat. 3207 (Oct. 27, 1986).

made "within 120 days after the sentence is imposed * * *."³ In 1979, Rule 35(b) was amended to add the following language: "Changing a sentence from a sentence of incarceration to a grant of probation shall constitute a permissible reduction of sentence under this subdivision."

The court of appeals held that any motion for probation in place of incarceration constitutes a request for reduction of sentence within the purview of Rule 35(b) and, as such, must be made within 120 days after sentence is imposed. Because the motion at issue here was filed more than one year after the expiration of the 120-day period, the court of appeals correctly ruled that the district court lacked jurisdiction to grant petitioner's motion to convert his prison sentence to one of probation.

Petitioner contends that the decision of the court of appeals conflicts with the decisions of the Second and Eighth Circuits in *United States v. Ellenbogen*, 390 F.2d 537 (2d Cir.), cert. denied, 393 U.S. 918 (1968), and *Phillips v. United States*, 212 F.2d 327 (8th Cir. 1954). There is no conflict with those cases. While those courts held that Rule 35(b) did not limit the time within which a district court could grant probation, those cases were decided before Rule 35(b) was amended in 1979. Because the 1979 amendment specifically applied the 120-day time limitation to orders changing a sentence of incarceration to a grant of probation, the pre-1979 cases cited by petitioner are readily distinguishable.

The only remaining authority cited by petitioner is *United States v. Karp*, 764 F.2d 613 (9th Cir. 1985), a case we believe was incorrectly decided. In *Karp*, the court concluded (*id.* at 615) that the purpose of the 1979 amendment to Rule 35(b) was to counter this Court's holding in

³ Pursuant to Rule 45(b)(2), Fed. R. Crim. P., as amended in 1966, the time constraints of Rule 35(b) may not be extended by the court.

United States v. Murray, 275 U.S. 347 (1928),⁴ but that Congress did not intend the amendment to apply the time limitation of Rule 35(b) to the district court's decision to grant probation. As the court below stated in this case (Pet. App. A14), *Karp* is "not in keeping with the clear language of the rule or intent of the rule as set forth in the Advisory Committee comments" on the 1979 amendment to Rule 35(b).

The Advisory Committee explained that Rule 35 was amended in 1979 "to make it clear that a judge may, in his discretion, reduce a sentence of incarceration to probation. To the extent that this permits the judge to grant probation to a defendant who has already commenced service of a term of imprisonment, it represents a change in the law" (Rule 35 advisory committee note on 1979 Amendment, 18 U.S.C. App. at 631). The committee stated that the amendment was necessary to change the rule enunciated in *United States v. Murray*, *supra*, and *Affronti v. United States*, 350 U.S. 79 (1955), that the Probation Act does not empower a district judge to order probation at any time after execution of the pronounced sentence begins. The committee also noted that the concerns this Court recited in *Murray* ("undue duplication of the three methods of mitigating a sentence—probation, pardon and parole" and the additional burden upon district judges "of responding to probation applications from prisoners throughout the service of their terms of imprisonment") would not be present because "the reduction may occur only within the time specified in * * * [Rule 35(b)]." Rule 35 advisory committee note on 1979 Amendment, 18 U.S.C. App. at 631.⁵

⁴ In *United States v. Murray*, *supra*, this Court held that probation could be ordered only before a defendant began to serve any part of the sentence initially imposed.

⁵ The *Karp* court apparently overlooked this statement in the advisory committee note when it concluded that the 1979 amendment "reveals no legislative intent" to make reductions of sentence to proba-

Thus, as the court of appeals correctly held, the plain language of the Rule and the accompanying committee note clearly provide that when a sentence of incarceration is changed to a grant of probation, that action shall constitute a reduction of sentence under Rule 35(b). As such, it necessarily requires application of the Rule 35(b) time constraints.

b. At all events, this case does not warrant review by the Court since both the current Rule 35(b) and 18 U.S.C. 3651 have been repealed as of November 1, 1987.

The Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, Ch. II, 98 Stat. 1987 *et seq.*, creates a new sentencing guidelines system that will eliminate the need for either Section 3651 or the present Rule 35(b). There is no provision in the new legislation allowing a defendant to move for reduction of sentence. Rather, the statute provides that a sentence imposed by a district judge is subject to appeal on grounds of illegality or an incorrect application of the sentencing guidelines. The new version of Rule 35(b) will permit reduction of sentence only on application of the government. Consequently, as of November 1, 1987, the conflict among the circuits over the issue presented in this case—an issue that arises infrequently in any event—will be of only historical interest.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General

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tion subject to the same time limitations as other reductions of sentence. 764 F.2d at 615.